Information Item: 2008 "Lakes" Cases from the Court of Appeals of Indiana:

(A) *DNR v. Lake George Cottagers Ass'n*
(B) *Daisy Farms Ltd. Partnership v. Morrolf*
(C) *Lukis v. Ray*
(D) *Bowyer v. DNR*

This item will review four published decisions from the Court of Appeals of Indiana which were rendered this year. The decisions lend instruction and provide direction concerning the management of "public freshwater lakes" and other public waters. The hope is that the item will result in an active discussion among members of the Advisory Council, the NRC's Division of Hearings, and the Department. Copies of the decisions are attached.

Indiana Dept. of Nat. Res. v. Lake George, N.E.2d 361 (Ind.App. 2008); *pending transfer*.

1 of 100 DOCUMENTS

INDIANA DEPARTMENT OF NATURAL RESOURCES and STATE OF INDIANA, Appellants-Defendants, vs. LAKE GEORGE COTTAGERS ASSOCIATION, Appellee-Plaintiff.

No. 76A03-0708-CV-381

COURT OF APPEALS OF INDIANA

889 N.E.2d 361; 2008 Ind. App. LEXIS 1343

June 30, 2008, Decided
June 30, 2008, Filed

PRIOR HISTORY: [**1]

APPEAL FROM THE STEUBEN CIRCUIT COURT. The Honorable Allen N. Wheat, Judge. Cause No. 76C01-0604-PL-205.

CASE SUMMARY:

PROCEDURAL POSTURE: The Steuben Circuit Court (Indiana) entered a judgment that granted summary judgment to appellee association after the association sought a declaratory judgment that appellant State owned the real estate underneath a dam and, thus, was responsible for repairing it. The State appealed.

OVERVIEW: The association was formed as a nonprofit corporation for various purposes. Part of the lake was conveyed to the association. Soon after the conveyance, the dam was built on that part of the association's property to control the lake's water level and prevent flooding. The association over the years retained title to the real estate conveyed to it. In the meantime, the legislature enacted the Lake Preservation Act, which gave the State full power and control of all of the public freshwater lakes in Indiana and provided that the State held and controlled all public freshwater lakes in trust for use by Indiana citizens for recreational purposes, pursuant to *Ind. Code § 14-26-2-5(d)*. The association sought a declaratory judgment that the State owned the dam and the land underneath it. Both the State and the association sought summary judgment, and the trial court granted the association's summary judgment motion. The appellate court then found that the legislature did not intend to confer on the State a right, title, or interest in or to the property where the dam was located, as required by *Ind. Code § 14-27-7.5-4*, and, thus, the State did not own the dam or the land beneath it.

OUTCOME: The appellate court reversed the trial court's summary judgment grant for the association and directed that summary judgment be granted to the State.

COUNSEL: FOR APPELLANTS: STEVE CARTER, Attorney General of Indiana; ELIZABETH ROGERS, Deputy Attorney General, Indianapolis, Indiana.

FOR APPELLEE: KARL L. MULVANEY, NANA QUAY-SMITH, Bingham McHale, LLP, Indianapolis, Indiana.

JUDGES: MAY, Judge. BAILEY, J., and BRADFORD, J., concur.

OPINION BY: MAY

OPINION

[*362] OPINION - FOR PUBLICATION

MAY, Judge

The Lake George Cottagers Association (hereinafter "the Association") sought a declaratory judgment the State [1] owns the real estate underneath a dam built in the 1930s and is therefore responsible for repairing it. The Association and the State both moved for summary judgment, and the trial court granted the Association's motion. We find the legislature could not have intended the Lake Preservation Act to confer on the State "a right, a title, or an interest in or to the property" where a dam is located. [2] *Ind. Code § 14-27-7.5-4*. We accordingly reverse and direct the entry of summary judgment for the State. [3]

1 The Department of Natural Resources (DNR), its predecessor agencies, and other State entities will be referred to as "the State."

2 Because we hold the State does not have an [**2] interest in the land under the dam, we do not address the Association's alternative arguments that 1) the State did not challenge one of two alternative bases for the summary judgment and therefore waived that argument on appeal, and 2) the State demonstrated its "interest, right and control" over the dam by "modifying the dam to maintain its water lever for use by the public." (Br. of Appellee at 14.)

3 We heard oral argument on April 9, 2008 before the Sherman Minton Inn of Court in New Albany. We thank the Inn of Court for its hospitality and commend counsel for the quality of their advocacy.

[*363] FACTS AND PROCEDURAL HISTORY

Lake George is a public freshwater lake, [4] part of which is located in Steuben County, Indiana. The Association was formed as a nonprofit corporation in 1927 for various purposes including promotion and preservation of Lake George and maintenance and preservation of the water level. An area at the south end of the Lake was called the Mill Pond. In 1928, a ten acre plot including the Mill Pond was conveyed to the Association. Sometime in the 1930s, the Dam was built on the Association's property at the south end of the Mill Pond to control the Lake's water level and [**3] prevent flooding of a nearby road.

4 A "public freshwater lake" for purposes of the Lake Preservation Act is "a lake that has been used by the public with the acquiescence of a riparian owner." *I.C. § 14-26-2-3.*

The Association still has title to the real estate conveyed in 1928. In 1947 the legislature enacted the Lake Preservation Act, which gave the State "full power and control of all of the public freshwater lakes in Indiana" and provided the State "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." *I.C. § 14-26-2-5(d).*

The Association sought a declaratory judgment the State owned the Dam and the real estate underneath it. Both the State and the Association moved for summary judgment, and the trial court granted summary judgment for the Association.

DISCUSSION AND DECISION

Our standard of review of a summary judgment ruling is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Row v. Holt, 864 N.E.2d 1011, 1013 (Ind. 2007).* That the parties made [**4] cross-motions for summary judgment does not alter our standard of review. Instead, we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. D'Angelo, 875 N.E.2d 789, 795 (Ind. Ct. App. 2007), trans, denied.*

I.C. § 14-26-2-5(d) provides the State "has full power and control of all of the public freshwater lakes in Indiana" and "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." The parties agree Lake George is a "public freshwater lake."

An "owner" of a dam is "an association, . . . a trustee, the state, an agency of the state, . . . or any other person who has a right, a title, or an interest in or to the property upon which the structure is located." *I.C. § 14-27-7.5-4.* The owner of a dam is obliged to "maintain and keep the structure in the state of repair and operating condition *I.C. § 14-27-7.5-7.* The trial court determined the State "holds title to the real estate beneath the Mill Pond Dam in trust for the use and benefit of its citizens," or in the alternative "clearly has the right to control the uses made [**5] of the Mill Pond lake bed and, therefore, does have an interest in the lake bed." (App. at 287.)

We believe the legislature could not have intended that Chapter 14-26-2 (the "Lake Preservation Act") confer on the State an ownership interest in land under a dam adjacent to a public freshwater lake. Rather, we agree the Act gives the State

> the right *only* to regulate and control, and hold in trust "public freshwater lakes" for the use of all citizens of [*364] Indiana. . . . There is no language in the Lake Preservation Act that declares the State of Indiana the "owner" of "public freshwater lakes" or more specifically of any structures adjacent to public freshwater lakes in Indiana.

(Br. of Appellant at 11) (emphasis in original). [5]

5 We acknowledge *dictum* in *Parkison v. McCue, 831 N.E.2d 118, 130 (Ind. Ct. App. 2005), trans, denied sub nom Kraus v. McCue, 841 N.E.2d 191 (Ind. 2005),* that "Under *Indiana*

Code Section 14-26-2-5 . . . the State of Indiana *holds* title to Clear Lake . . . ." *Parkison* did hot hold, and could not have held, the Lake Preservation Act had the effect of conveying to the State legal title to public lakes. *Parkison* involved a dispute between lakefront property owners and back **[**6]** lot owners over the permissible uses of an easement to a beach. The trial court determined the scope of the easement did not include construction of structures on it; rather, the easement was for ingress and egress to the lake by the back lot owners. The State was not a party to the litigation and its right to the easement, or to any other property, was not at issue.

We determined the easement had been extinguished because it was underwater, but the back lot owners still had a right to use the lake for recreational purposes:

> while . . . back lot owners may enjoy walking in the water along the shoreline, the right to do so no longer originates from the dedication, but rather under Indiana statute. Under *Indiana Code Section 14-26-2-5*, citizens may enjoy public waters for recreational purposes. As a public lake, the State of Indiana holds title to Clear Lake, and riparian owners do not have an exclusive right to any part of the lake. *Id.* Accordingly, the right of back lot owners to walk in the shallow waters of Clear Lake is the same right as any citizen.

The *Parkison* reasoning accordingly demonstrates the Act was intended to protect the public's right to enjoy public freshwater lakes for **[**7]** recreational purposes, and not to transfer to the State legal title to the land underneath such lakes. In context, our reference to the State's "title" is not a reference to "legal" title, but rather is to be read in a more general sense as "something that justifies or substantiates a claim" or "a ground of right," Webster's Third New International Dictionary 2400 (1976), specifically in the case before us the State's right to monitor, inspect, and regulate dams on public freshwater lakes as set forth by the legislature.

To support its argument it has only "limited control" over public freshwater lakes to regulate the public's use, (*id.*), the State notes other statutory sections addressing the DNR's enforcement and inspection powers. For example, *I.C. § 14-27-7.5-8* [6] provides the DNR has "jurisdiction and supervision over the maintenance and repair of dams in, on, or along lakes in Indiana, and "shall exercise care to see that the structures are maintained in a good and sufficient state of repair and operating condition to fully perform the intended purpose." If a dam becomes so dangerous that the DNR believes "there is not sufficient time for the issuance and enforcement of an order **[**8]** for the maintenance, alteration, repair, reconstruction, change in construction or location, or removal" of the dam, the DNR may immediately take emergency measures and recover the cost "*from the owner* by appropriate legal action." *I.C. § 14-27-7.5-12* (emphasis supplied). The DNR may issue a notice of violation if the DNR finds a dam is not sufficiently strong, not adequately maintained, or otherwise unsafe: *I.C. § 14-27-7.5-11*. The State characterizes these statutes as "regulatory enforcement tools to ensure that dams in Indiana are safe," (Br. of Appellant at 13), and asserts these statutes place the burden of dam repair and maintenance on the owner of the dam, but do not equate to State ownership of dams.

> 6 The State directs us to *I.C. § 14-27-7.5-8*. There does not appear to be any such chapter in the Code. The language the State quotes is found in *section 14-27-7.5-8*.

When the legislature enacts a statute, we presume it is aware of existing **[*365]** statutes in the same area. *Orndorff v. New Albany Housing Authority, 843 N.E.2d 592, 594 (Ind. Ct. App. 2006), trans, denied 860 N.E.2d 584 (Ind. 2006)*. If the legislature had intended to acquire ownership of public freshwater lakes via the Lake **[**9]** Preservation Act, it would not have subsequently enacted a statutory scheme to authorize its "jurisdiction and supervision over the maintenance and repair of" dams it already owned. Nor would it have promulgated statutes to permit the DNR to issue notices of violations to itself or to recover from itself the cost of emergency measures.

The State also notes Article 14-33, which addresses Conservancy Districts, provides multiple methods to fund improvements to dams: "If the legislature had intended that the Lake Preservation Act be interpreted as State ownership of all dams on 'public freshwater lakes,' it would not have provided these other funding mechanisms." (Br. of Appellant at 13.)

Our decisions have similarly indicated the State's authority under the Lake Preservation Act is not an "ownership" interest. *See Lake of the Woods v. Ralston, 748 N.E.2d 396, 401 (Ind. Ct. App. 2001)* (public trust legislation, specifically *I.C. § 14-26-2-5*, modified common law riparian rights [7] by recognizing the public's right to preserve the natural scenic beauty of our lakes and to

recreational values upon the lakes), *trans, denied 761 N.E.2d 419 (Ind. 2001)*. Therein we addressed one of the State's **[**10]** interests:

> The government is interested in establishing a water level which insures (1) that the public exercises its vested right to the preservation, protection, enjoyment, and recreational use of a public freshwater lake; (2) that the State exercises its duty as it holds and controls all public freshwater lakes in trust for the public; and (3) that riparian owners exercise their right to use of the lake to the fullest, responsible extent possible.

Id. at 403.

7 The State asserts, without explanation or citation to authority, "The Lake Preservation Act *has not changed the rights or titles of riparian owners*." (Br. of Appellant at 15) (emphasis supplied). We explicitly held otherwise in *Lake of the Woods*.

The State did not become an "owner" of the land under the Mill Pond Dam by conveyance, by virtue of the Lake Preservation Act, or otherwise. Summary judgment for the Association was therefore error, and we direct the entry of summary judgment for the State.

Reversed.

BAILEY, J., BRADFORD, J., concur.

Daisy Farm LTD. Partnership v. Morrolf, 886 N.E. 2d 604 (Ind.App. 2008); *reh'g denied; pending transfer*.

1 of 100 DOCUMENTS

DAISY FARM LIMITED PARTNERSHIP, Appellant-Plaintiff, vs. MICHAEL MORROLF and JILL MORROLF, Appellees-Defendants.

No. 43A04-0707-CV-390

COURT OF APPEALS OF INDIANA

886 N.E.2d 604; 2008 Ind. App. LEXIS 1025

May 16, 2008, Decided
May 16, 2008, Filed

SUBSEQUENT HISTORY: Rehearing denied by Daisy Farm L.P. v. Morrolf, 2008 Ind. App. LEXIS 1646 (Ind. Ct. App., July 18, 2008)

PRIOR HISTORY: [**1]
APPEAL FROM THE KOSCIUSKO CIRCUIT COURT. The Honorable Rex L. Reed, Judge. Cause No. 43C01-0202-PL-151.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant property owner's predecessors in interest sued appellee neighbors in the Kosciusko Circuit Court (Indiana), to quiet title in property. When the predecessors sold their property to the owner, the owner was substituted in the litigation. The court ruled that the parties' riparian rights were consistent with the property lines and that the owner failed to acquire a portion of the neighbors' lot by adverse possession. The owner appealed.

OVERVIEW: The parties owned adjoining property lots that abutted a lake. The owners contended that the positioning of the neighbors' pier interfered with the owner's use of its own pier and marred its view of the lake by forcing the owner to view the neighbors' pier instead of its own pier. On appeal, the court found that the trial court did not err by concluding that riparian rights could be determined by extending the property lines of the lots into the lake. However, the trial court erred in determining as matter of law that the owner and its predecessors were prohibited from acquiring a portion of the neighbors' lot on the basis that they, along with other owners of property around the lake and the general public, had the right to use northern portions of the lot as a thoroughfare and/or beach area. The trial court was required to determine whether the owner and/or its predecessors in title exerted sufficient control, intent, notice, and duration in addition to the permitted use under the easement. Finally, the trial court erred in not considering whether the owner and its predecessors substantially complied with *Ind. Code § 32-21-7-1*.

OUTCOME: The judgment was reversed, and the case was remanded with instructions that the trial court make determinations based upon the evidence already presented.

COUNSEL: ATTORNEYS FOR APPELLANT: MICHAEL A. WILKINS, BRIAN J. PAUL, JENNY R. WRIGHT, Indianapolis, Indiana.

ATTORNEYS FOR APPELLEES: STEPHEN R. SNYDER, RANDALL L. MORGAN, Syracuse, Indiana.

JUDGES: HOFFMAN, Senior Judge. DARDEN, J., and VAIDIK, J., concur.

OPINION BY: HOFFMAN

OPINION

OPINION - FOR PUBLICATION

[*605] HOFFMAN, Senior Judge

Plaintiff-Appellant Daisy Farm Limited Partnership ("Daisy Farm") appeals the trial court's judgment in favor of Defendants-Appellees Michael Morrolf and Jill Morrolf (the "Morrolfs"). We reverse and remand with instructions.

Daisy Farm raises two issues for our review, which we restate as:

I. Whether the trial court erred as a matter of law in determining riparian boundaries.

II. Whether the trial court erred in determining that a disputed tract did not pass to Daisy Farm by virtue of adverse possession. [1]

1 We note that the Morrolfs argue that the trial court determined that Daisy Farm failed to present the court with a proper legal description of the property sought through adverse possession. In support of this argument, the Morrolfs' cite to an unsigned memorandum included in the Appellant's App., **[**2]** which appears to have been submitted by the Morrolfs to the trial court along with their proposed findings. This unsigned memorandum is not part of the trial court's signed order.

[*606] Daisy Farm and the Morrolfs own adjoining lots of land in Cripplegate Heights, a neighborhood located at the south end of Lake Tippecanoe in Kosciusko County, Indiana. Daisy Farm owns Lot 12. Immediately to the east of Lot 12 is the Morrolfs' property, Lot 13. The property lines of Lots 12 and 13 meet Tippecanoe Lake at an angle. Both Daisy Farm and the Morrolfs have cottages on their lots overlooking the lake to the north, and both maintain piers extending from their property out into the lake.

Each lot has approximately thirty-three feet of frontage along the lake, and a long sidewalk and grassy area known as "Lake Boulevard" runs across both properties between the cottages and the lake by virtue of a thirty-foot-wide public easement. Also, subsequent to the recording of the original plat for Cripplegate Heights in 1903, lot owners added fill to the area north of Lake Boulevard and thus created a new tract of land outside the boundaries of the plat of Cripplegate Heights. On December 31, 1938, the Kosciusko **[**3]** Circuit Court entered a judgment ("1938 Judgment") confirming the rights of the public over Lake Boulevard and declaring an easement over and across the new tract of land in favor of lot owners in Cripplegate Heights. Thus, both Daisy Farm and the Morrolfs acquired title expressly subject to "easements of the General Public and Lake Boulevard." (Finding of Fact # 3; Appellant's App. at 8). Concrete sidewalks run on either side of Lot 12 and "T" into Lake Boulevard. A sea wall is built between Lake Boulevard and the new tract of land.

On February 21, 2002, Gary and Annitra Chappell, Daisy Farm's predecessors in interest to Lot 12, brought suit against the Morrolfs to quiet title in the lot. When the Chappells sold Lot 12 to Daisy Farm in May 2003, Daisy Farm was substituted for the Chappells in the litigation.

After a bench trial, the trial court entered findings of fact and conclusions of law in support of its determination that (1) the parties' riparian rights are consistent with the lots' property lines, and (2) Daisy Farm failed to show that it acquired a portion of Lot 13 by adverse possession.

When reviewing claims tried without a jury, "the findings and judgment are not to be set **[**4]** aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of witnesses." *Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005)*. A trial court's judgment is clearly erroneous "when there is no evidence supporting the findings or the findings fail to support the judgment. . . . and when the trial court applies the wrong legal standard to properly found facts." *Id.* (internal citations and quotations omitted). Although findings of fact are reviewed for clear error, appellate courts pay no deference to a trial court's conclusions of law, reviewing those de novo. *Id.* Cases that present mixed issues of fact and law are reviewed under the abuse of discretion standard. *Id.* If a trial court mischaracterizes findings as conclusions or vice versa, a court of review will "look past these labels to the substance of the judgment." *Id.*

I.

The first issue before this court is whether the trial court erred in determining the riparian boundaries of Lots 12 **[*607]** and 13. As a general rule, a property owner whose property abuts a lake, river, or stream possesses certain riparian rights associated with ownership of such a property. *Parkison v. McCue, 831 N.E.2d 118, 128 (Ind. Ct. App. 2005)*, **[**5]** *trans. denied; see also Brown v. Heidersbach, 172 Ind.App. 434, 360 N.E.2d 614, 619 (1977)* (holding that a riparian owner acquires his rights to the water from his fee title to the shore land). The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. *Center Townhouse Corp. v. City of Mishawawka, 882 N.E.2d 762 (Ind. Ct. App. 2008), trans. pending* (citing ROBERT E. BECK, WATERS AND WATER RIGHTS § 6.01(a) (2001)). Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property. *Id.* (citing *78 Am.Jur.2d Waters § 30* (2002)). Riparian owners may exercise rights such as access, swimming, fishing, bathing and boating. *Zapffe v. Srbeny, 587 N.E.2d 177, 181 (Ind. Ct. App. 1992), trans. denied.* The installation of a

pier by a riparian owner is a reasonable use. *Id.* It is the position of the Morrolfs' pier that occasions this appeal of the trial court's determination of the parties' riparian boundaries, as Daisy Farm contends that the positioning of Morrolfs' pier interferes with Daisy Farm's use of its own pier and mars its view of the lake by forcing Daisy Farm to **[**6]** view the Morrolfs' pier instead of its own pier.

Daisy Farm specifically contends that the trial court erred as a matter of law in not concluding that the riparian boundaries of Lots 12 and 13 were to be determined by extending the property lines into the lake at a ninety-degree angle from the point where they meet the shoreline (the "right angle method"). [2] Daisy Farm argues that the method used by the trial court of continuing the property lines straight out into the lake (the "straight extension method") is improper under the circumstances of this case.

> 2 The Morrolfs contend that Daisy Farm invited error on this issue because it argued that either its understanding of the historical property lines or the "right angle method" would apply here. In this case, we do not believe that the use of alternative arguments constitutes an invitation of error. *See e.g., Parkison, 831 N.E.2d at 129.*

Daisy Farm cites *Bath v. Courts, 459 N.E.2d 72 (Ind. Ct. App. 1984)*, where this court adopted the reasoning of the Wisconsin Court of Appeals in *Nosek v. Stryker, 103 Wis. 2d 633, 309 N.W.2d 868 (Wis. Ct. App. 1981)* for determining the riparian rights of properties with shoreline boundaries where property lines meet the **[**7]** shoreline at right angles. In *Bath,* we held that the straight extension method was proper. Daisy Farm points out that in *Nosek* the Wisconsin court also outlined the right angle method as the proper approach where, as in the present case, the property lines meet the shoreline at acute or obtuse angles.

Daisy Farm's argument must fail. Although in *Bath* we did apply the straight extension method as that method was described in *Nosek,* we did not "adopt" the right angle method described in *dicta* by the Wisconsin court. Thus, although the trial court was free to apply the right angle method in the present case, it was not required to do so as a matter of law.

The rule in Indiana is that riparian owners are permitted "to maintain a pier so long as it does not interfere with rightful uses of the lake by others." *Bath, 459 N.E.2d at 76.* In the present case, the trial court made the following pertinent findings:

> 24. Piers connected with Lots 12-22 in Cripplegate Heights have historically **[*608]** been placed between the platted lot lines as hypothetically extended into Tippecanoe Lake.
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> 25. The typical single-family pier structures and watercraft uses by the owners of Lots 12-22 in Cripplegate Heights may **[**8]** be adequately accommodated by a 33-foot wide riparian area located between the platted lot lines as hypothetically extended into Tippecanoe Lake.

(Appellant's App. at 14).

Our review of the appellate briefs and the record discloses that Daisy Farm does not challenge the trial court's findings of fact and that there is evidence to support the trial court's finding that pier structures and watercraft uses may be adequately accommodated by the 33-foot wide riparian area resulting from the hypothetical extension of platted lot lines into Tippecanoe Lake. For example, one long-time resident acknowledged that all lot owners would "have room to put 22 or 23 feet of width for two boats and a dock if they did it within the lines of both lots as shown on the Plat extended into the water[.]" Transcript at 244. Indeed, it appears that any interference with riparian uses by Cripplegate owners was occasioned by the failure of some lot owners to place their piers within the aforementioned extension of platted lot lines.

In summary, we hold that while the application of the right angle approach may have established a bright line rule that would have been easier to apply, such application is not mandated **[**9]** by our holding in *Bath.* We further hold that the trial court's extension of platted lot lines approach, if enforced, will permit each riparian owner on Lake Tippecanoe to enjoy rightful use of the lake without interference from a neighbor's pier. [3]

> 3 We have recently held in an inverse condemnation case that Indiana courts do not recognize a riparian right to an unobstructed view of the water, expressing our view that such a determination is best left to other branches of government. *Center Townhouse, 882 N.E.2d at 771-72.* We note that if the trial court's determination is strictly enforced it is not clear whether Daisy Farm will be compelled to view the Morrolfs' pier, and in any event, we hold that the *Center Townhouse* reasoning applies to the facts of this case.

II.

Daisy Farm contends that the trial court erred in determining that Daisy Farm and previous owners of Lot

12 had not acquired by adverse possession a narrow, triangular area located in the platted lines of Lot 13 that begins between the cottages and runs north to the lake. Daisy Farm argues that previous owners acquired ownership of the disputed tract of land by adverse possession as early as 1976. Daisy Farm further argues **[**10]** that the trial court should have concluded that the "line of possession" established by the historical treatment of the property line by the owners--not the platted lot line--defines the boundary between Lots 12 and 13.

Our supreme court has held that clear and convincing proof of the following entitle a person to acquire property by adverse possession:

> (1) Control--The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
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> (2) Intent--The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of **[*609]** "claim of right," "exclusive," "hostile," and "adverse");
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> (3) Notice--The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements);
>
> (4) Duration--the claimant must satisfy each of these elements continuously for **[**11]** the required period of time (reflecting the former "continuous" element).

Fraley, 829 N.E.2d at 486.

Here, the trial court made the following findings in support of its conclusion that Daisy Farm failed to establish its adverse possession claim:

> 19. The testimony and other evidence introduced at trial that the real estate north of Lots 12 through 33 in Cripplegate Heights as extended to the water's edge of Tippecanoe Lake was historically used since at least 1951 in a non-exclusive manner by adults and children alike, including recreational uses across such real estate along the sidewalk and land north of the sidewalk on Lake Boulevard, the beach areas along the shore of Tippecanoe Lake, and the piers placed at the shore of Tippecanoe Lake.
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> 20. A lakefront resident since 1951 testified in detail as to the non-exclusive uses over time without restrictions by the general public, including the other lakefront and non-lakefront residents in Cripplegate Heights, across all of the real estate comprising Lake Boulevard and north of Lake Boulevard to the water's edge of Tippecanoe Lake.
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> 21. A non-lakefront resident in Cripplegate Heights since 1973 testified that she routinely accessed that area **[**12]** north of Lots 12-33 in Cripplegate. Heights as extended to the water's edge of Tippecanoe Lake and observed over time the uses of such real estate by the public. With respect to that portion of Daisy Farm and Morrolf Real Estate north of Lots 12 and 13 as extended to the water's edge of Tippecanoe Lake, she further testified as to the "free passage" that existed across such real estate, that she had never been told not to use such real estate, that she was unaware of anyone being told not to use such real estate, and that no one prevented her uses of such real estate.
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> 22. No one has historically taken any action to prevent any person from using any portion of the real estate north of Lots 12 through 33 in Cripplegate Heights as extended to the water's edge of Tippecanoe Lake.
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> 23. The non-exclusive historical uses of the real estate north of Lots 12 and 13 are consistent with those non-exclusive historical uses of the real estate north of Lots 13 and 14 in Cripplegate Heights as extended to the water's edge of Tippecanoe Lake considered by this Court [in a 1996 ruling that Lake Boulevard "was set apart for purposes of ornament, exercise, and amusement" and that lakefront landowners cannot **[**13]** obstruct the use of Lake Boulevard by others. . . ."] [4]
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> **[*610]** 35. As supported by the records admitted into evidence and testi-

mony of Susan Stookey, the Plain Township Assessor, and Jill Morrolf, the Morrolfs and their predecessors-in-interest paid and discharged the real estate taxes due on the Morrolf Real Estate, including that portion of the Morrolf Real Estate north of Lot 13 as extended to the water's edge of Tippecanoe Lake.

36. As supported by the records admitted into evidence and testimony of Susan Stookey, Plain Township Assessor, Daisy Farm and its predecessors-in-interest paid and discharged the real estate taxes due on the Daisy Farm Real Estate, including that portion of the Daisy Farm Real Estate north of Lot 12 as extended to the water's edge of Tippecanoe Lake.

37. Daisy Farm did not pay any real estate taxes due on the Morrolf Real Estate, including that portion of the Morrolf Real Estate north of Lot 13 as extended to the water's edge of Tippecanoe Lake.

Appellant's App. at 13-15.

4 See Finding of Fact # 12, which explains the 1996 judgment. Appellant's App. at 9-10.

Initially, it is clear from Findings of Fact 19-23 that the trial court determined as a matter of law that **[**14]** Daisy Farm failed to show intent (exclusivity) because other people, including other lakefront owners and the general public, exercised an easement across the north portions of Lot 13. In explaining the trial court's reasoning, the Morrolfs cite to *Sims v. Town of New Chicago, 842 N.E.2d 830 (Ind. Ct. App. 2006)* and similar cases for the proposition that prescriptive rights cannot be acquired in property affected with public interest or dedicated to public use. Appellees' Brief at 19. As explained in *Sims,* however, these cases hearken back to the ancient common law maxim that "no prescriptive right could be asserted against the king," which is now expressed as "[n]o prescriptive right can be obtained against the *Government.*" *Id. at 834.* (emphasis provided). Thus, these cases have no application here where Daisy Farm is asserting a prescriptive right against the Morrolfs.

The Morrolfs also cite *Naderman v. Smith, 512 N.E.2d 425, 431 (Ind. Ct. App. 1987)* for the proposition that "a permitted use cannot be adverse so as to ripen into fee simple ownership through adverse possession. If an easement is enjoyed under a deed, there can be no adverse enjoyment until the expiration of the right **[**15]** under the deed." This case is applicable in the present case only if the use by Daisy Farm and its predecessors does not exceed the use granted to other Cripplegate owners and the general public. Of course, by introducing evidence of installing hedges and planting flower gardens, Daisy Farm is asserting that it acquired the disputed portion of Lot 13 not by engaging in the permitted use but by exceeding those rights given to the other Cripplegate owners and the general public. Thus, Daisy Farm is asserting that it acquired by adverse possession a portion of Lot 13 from the Morrolfs as private owners and that it acquired the lot subject to the same easement that was imposed on the Morrolfs.

It is also clear from Findings of Fact 35-37 that the trial court determined as a matter of law that Daisy Farm cannot prevail on its adverse possession claim because neither Daisy Farm nor its predecessors paid taxes on the disputed section. Although the trial court did not mention *Ind. Code § 32-21-7-1* in its findings, it is clear that these findings are based on the statute, which states that possession of the land or real estate is not adverse to the owner in a manner as to establish title or **[**16]** rights in and to the land or real estate **[*611]** unless the adverse possessor or claimant "pays and discharges all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely." In *Fraley,* the Supreme Court reaffirmed an earlier holding that "permits substantial compliance to satisfy the requirement of the adverse possession tax statute in boundary disputes where the claimant has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession." *829 N.E.2d at 493.* Here, although there is testimony of the reasonable and good faith belief of Daisy Farm's predecessors, the trial court made no finding or conclusions about that belief That leads us to believe that the trial court did not consider the credibility of such evidence.

In summary, we conclude that the trial court did not err in concluding that riparian rights could be determined by extending the property lines of the lots into Lake Tippecanoe. We further conclude that the trial court erred in determining **[**17]** as matter of law that Daisy Farm and its predecessors were prohibited from acquiring a portion of Lot 13 on the basis that they, along with other Cripplegate owners and the general public, had the right to use northern portions of the lot as a thoroughfare and/or beach area. The trial court was required to determine whether Daisy Farm and/or its predecessors in title exerted sufficient control, intent, notice, and duration in addition to the permitted use under the easement. Finally, we conclude that the trial court erred in not considering whether Daisy Farm and its predecessors substantially

complied with *Ind. Code § 32-21-7-1.* [5] We reverse and remand for further proceedings consistent with this opinion, with instructions that the trial court make determinations based upon the evidence already presented.

5 We note that Daisy Farm believes that this court should make factual determinations based on the evidence presented in the record. Because the evidence is disputed, we leave these determinations to the trier of fact.

Reversed and remanded with instructions.

DARDEN, J., and VAIDIK, J., concur.

Lukis v. Ray, 888 N.E.2d 325 (Ind.App. 2008); *transfer denied.*

1 of 100 DOCUMENTS

MICHAEL LUKIS, Appellant-Respondent, vs. DEAN RAY, JOHN BLACKBURN, and THOMAS BLACKBURN, Appellees-Petitioners.

No. 76A03-0711-CV-513

COURT OF APPEALS OF INDIANA

888 N.E.2d 325; 2008 Ind. App. LEXIS 1253

June 13, 2008, Decided
June 13, 2008, Filed

PRIOR HISTORY: [**1]
APPEAL FROM THE STEUBEN CIRCUIT COURT. The Honorable Allen N. Wheat, Judge. Cause No. 76C01-0701-PL-33.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant lake-front property owner challenged an order of the Steuben Circuit Court (Indiana), which conducted judicial review of a decision of the Indiana Natural Resources Commission (NRC), found that the way the NRC evaluated appellant's and appellee lake-front property owner's respective riparian rights was contrary to law, and remanded the matter for reconsideration.

OVERVIEW: Appellant installed a pier that was located 10 feet closer to appellee's property line than the pier installed by appellant's predecessor. Appellee brought an action before the NRC alleging unreasonable interference with riparian rights. The court found that there were no fixed rules governing disputes pertaining to riparian owners' boundaries that extended into the water. The trial court, therefore, erroneously concluded that the NRC's failure to follow the Nosek rule was contrary to law. A condition of owning the respective lots was that each party's riparian zones would be determined by extending their property lines into the lake. Having made such an agreement, they should not have been permitted to argue for a contrary method to calculate their riparian zones. The NRC concluded that based on the scant evidence available to it regarding the length and width of piers in the relevant vicinity, appellant's pier was not unusually long or wide and did not infringe on the appellees' access to the lake. The court would not second-guess that determination.

OUTCOME: The court reversed the determination.

COUNSEL: FOR APPELLANT: STEPHEN R. SNYDER, RANDALL L. MORGAN, Snyder, Birch & Morgan LLP, Syracuse, Indiana.

FOR APPELLEES: GEORGE G. MARTIN, Fort Wayne, Indiana.

JUDGES: BAKER, Chief Judge. RILEY, J., and ROBB, J., concur.

OPINION BY: BAKER

OPINION

[*326] OPINION--FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Michael Lukis appeals the trial court's order determining that the way in which the Indiana Natural Resources Commission (NRC) evaluated the parties' respective riparian rights was contrary to law and remanding the matter for reconsideration. Lukis argues that in arriving at that result, the trial court overstepped its authority on judicial review of an administrative action. Finding that the trial court erroneously concluded that the NRC's determination was contrary to law, we reverse.

FACTS [1]

1 We heard oral argument in Indianapolis on May 22, 2008. We thank the parties for their excellent oral presentations.

Lukis and appellees-petitioners Dean Ray, John Blackburn, and Thomas Blackburn (collectively, the ap-

pellees) each own lakefront properties on Lake James in Steuben County. Lukis's lot is on the west end of a cove **[**2]** and includes 85.19 feet of lake frontage. The Blackburns' property abuts the eastern boundary of Lukis's lot and includes 29.93 feet of lake frontage. Ray's property abuts the eastern boundary of the Blackburns' property and includes 24.02 feet of lake frontage. None of the lots intersect the lake at right angles and all of the lots are irregularly shaped. The lots belonging to Ray and the Blackburns are included as part of the plat of the First Addition to Gleneyre Beach; consequently, they are subject to the constitution, bylaws, and restrictive covenants of the Gleneyre Association, Inc. Appellant's App. p. 183.

In 2005, Lukis installed a pier that was eighty-nine feet long and twenty-seven feet wide. The pier was located approximately ten feet closer to the Blackburns' west property line than piers installed by Lukis's predecessors had been. As a result of the location and orientation of Lukis's pier, the Blackburns had to relocate their pier thirty feet farther east than it had been in the past, which precluded Ray from accessing the lake from the west side of his pier. Additionally, Ray had to shorten his pier by twenty feet, causing him to experience navigation problems. Ray's **[**3]** **[*327]** neighbors to the east agreed to allow him to park his pontoon on the east side of his pier, which was within their property lines as extended into the lake, for the 2005 through 2007 lake seasons, but had they refused he would have had no way of accessing the lake. Lukis refused the appellees' requests to decrease the size of his pier or change its orientation.

On May 31, 2005, Ray instituted an action with the NRC, seeking resolution of the pier dispute. The Blackburns, Lukis, and other property owners who did not take part in the eventual trial court proceedings joined the NRC action. Lukis filed a counterclaim against Ray and a cross-claim against the Blackburns and other parties, alleging unreasonable interference with his riparian rights.

On June 8, 2006, the Administrative Law Judge (ALJ) conducted a hearing and issued a non-final order on August 16, 2006, finding in pertinent part as follows:

> 39. The Grounds Committee of the Gleneyre Association established rules and regulations including a determination that "each lakefront lot owner shall have full riparian rights to the lakefront bounded by the respective property lines extended past the shoreline."
>
> ***
>
> 49. . . . [the appellees] **[**4]** dispute the reasonableness of determining riparian zones by the extension of property lines into Lake James.
>
> ***
>
> 52. While there is "no set rule in Indiana for establishing the extension of boundaries into a lake," [*Rufenbarger v. Lowe,* 9 Caddnar 150, 152 (2004),] two general premises for such determination have emerged. *Id.*
>
> 53. "Where a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore property boundaries" lakeward. *Id.*
>
> 54. However, "when the shoreline is irregular, and drawing lines at right angles to the shoreline would not accomplish a just apportionment, the boundary lines should divide the available navigable waterfront in proportion to the amount of shoreline of each owner . . . ." *Id.* []
>
> 55. Based upon the evidence presented in the instant proceeding, the shoreline is generally irregular and the parties' onshore property lines are not perpendicular to the shoreline.
>
> 56. Therefore, Lukis' *complete* reliance upon the extension of onshore property boundaries lakeward is somewhat misplaced in this particular case.
>
> 57. However, the riparian zones determined by extending **[**5]** onshore property lines lakeward appear to accomplish a just apportionment between the respective parties based upon the "amount of shoreline of each owner." *Rufenbarger,* supra.
>
> 58. The riparian . . . zones clearly establish that Ray possesses the smallest amount of lakeshore . . . and in accordance with an apportionment methodology also possesses the smallest riparian zone. The Blackburns'. . . . shoreline is only slightly longer than Ray's and results in a riparian zone only slightly larger than Ray's. Lukis, who possess **[*328]** by far the largest expanse of shoreline . . . , controls the largest riparian zone of all the parties.
>
> ***

61. In this particular case, the result of establishing the parties' riparian zones by extending onshore property lines lakeward, equivocates the apportionment of riparian zones consistent with the amount of shoreline owned by each respective owner. [FN 7]

[FN 7.] The Gleneyre Association, Inc. through its rules and regulations, which are "maintained for the mutual benefit and protection of all owners," has determined that the riparian zones of lakefront owners shall be determined by the "property lines extended." Exhibit I, pg 6. Restrictive covenants of this type **[**6]** should be enforced unless they are ambiguous or violate public policy. *Renfro v. McGuyer, 799 N.E.2d 544 (Ind. [Ct.] App. 2003)*. The Gleneyre Association, Inc.'s rules, regulations, restrictions and covenants were not the deciding factor in this proceeding; however, it is noted that those rules and regulations are consistent with the conclusion reached.

62. It is hereby determined that establishing Ray's, Lukis', [and] the Blackburns' . . . riparian zones by extending their onshore property lines lakeward is appropriate.

***

86. In 2005, Ray was forced to shorten his temporary pier by twenty (20) feet as a result of Lukis installing his newly configured pier and Lukis' refusal to allow the Blackburns' continued encroachment into what Lukis claims as his riparian zone.

***

102. As a result of Lukis' temporary pier installation, the Blackburns were forced to relocate their temporary pier.

***

116. It is imperative that all of the parties embrace the reality that the old pier configurations, which obligated the Blackburns to encroach upon what is now the Lukis riparian zone in order to allow Ray to encroach upon the Blackburns are no more.

***

120. Ray argues that Lukis' temporary pier is unusually **[**7]** wide and long in comparison to other temporary piers located in the vicinity [in violation of *312 IAC 11-3-1(b)(4)*].

121. Evidence provided in this proceeding establishes no exact dimensions associated with any temporary piers . . . except for those . . . maintained by Lukis, the Blackburns and Ray.

***

123. Contrary to Ray's argument, one aerial photograph reveals that the lengths and widths of piers in the area vary greatly.

124. The evidence does not support a determination by a preponderance of the evidence that Lukis' temporary pier is unusually wide or long . . . .

***

128. The Blackburns and Ray . . . , due to the size and shape of their riparian zones, lack any ability to accommodate their neighbors and only limited ability to improve their own situation.

129. Conversely, . . . Lukis [is] . . . permitted some flexibility by the size and shape of [his] riparian zone[]. As such, Lukis . . . who **[*329]** possess[es] the ability to either impede the remaining parties' access and navigation or improve the situation, must choose the latter.

FINAL ORDER

130. Riparian zones of the respective parties are determinable by extending their own shore property lines lakeward. . . .

131. Absent a written agreement **[**8]** between impacted parties, each of the parties are obligated to maintain any temporary structure, as well as all appendages to the temporary structure (including watercraft), within their own individual riparian zones.

132. . . . [N]o party may place or maintain any temporary structure or any appendage to a temporary structure (including watercraft) within Lake James in a manner that infringes upon another ri-

> parian owner's or the public's access to Lake James or that serves as an impediment to navigation.

Appellant's App. p. 29-35 (some footnotes and citations omitted) (emphasis in original). The appellees filed written objections to the nonfinal order and after hearing argument, the Administrative Orders and Procedures Act Committee of the NRC issued a final order fully adopting the ALJ's nonfinal order.

On January 16, 2007, the appellees filed a petition for judicial review. Following a hearing, the trial court entered an order on September 24, 2007, remanding the matter to the NRC. Among other things, the trial court found as follows:

> 4. Lukis constructed a dock and boatlift. The dock was approximately 89 feet long and was 27 1/2 feet wide at the lake end.
>
> 5. Historically, the dock of **[**9]** Lukis' predecessors in title was 40 feet long.
>
> 6. The difference in water depth from the lake end of a dock extending 40 feet to the lake end of the same dock extending 89 feet is approximately 6 inches.
>
> ***
>
> 26. The case of *Bath v. Courts, 459 N.E.2d 72 (Ind. App. 1984)* teaches us that when contiguous lakefront property owners have a dispute regarding their respective riparian rights, if their property boundaries are perpendicular to the shoreline, then it is appropriate in establishing riparian rights to simply extend their respective property boundaries into the lake. The *Bath* court relied upon the opinion of *Nosek v. Stryker, 103 Wis. 2d 633, 309 N.W.2d 868 (Wis. 1981)*. In the case at bar the respective boundary lines . . . do not touch upon Lake James at right angles. Rather, their respective properties sit on a cove.
>
> 27. This Court has been unable to find any Indiana case which deals directly with the factual scenario with which it has been presented.
>
> 28. The *Nosek* court, however, did set forth a formula for dealing with the factual situation before this Court . . . .
>
> 29. When presented with irregular property lines such as in the case at bar the *Nosek* court adopted what it called the "apportionment **[**10]** method" of adjusting disputed riparian rights . . . .
>
> 30. By application of the apportionment method . . . each lakefront property owner receives a navigable **[*330]** waterfront proportionate to the width of that property owner's shore line.
>
> 31. In the case at bar the ALJ did not apply the apportionment method in developing riparian zones for Lukis, Ray and Blackburn. Rather, the ALJ extended existing property lines into Lake James. By so doing, Ray finds himself in the precarious position of having to rely upon the largesse of [his neighbor] in order to moor his pontoon boat.
>
> 32. This Court concludes that the ALJ did not establish riparian zones among Lukis, Ray and Blackburn in accordance with the apportionment method as set forth in *Nosek* . . . and, therefore, the decision of the ALJ is contrary to law.
>
> ***
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. This case is remanded to the [NRC] for further proceedings not inconsistent with the Order of the Court entered this date.

Appellant's App. p. 9-15. Lukis now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The manner in which we review the decision of an administrative agency is well established:

> In reviewing an agency decision, **[**11]** we may provide relief only if the decision is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance

> of procedure required by law; or (5) unsupported by substantial evidence. An administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances of the case, or without some basis that would lead a reasonable and honest person to the same conclusion. . . .

Rice v. Allen County Plan Comm'n, 852 N.E.2d 591, 597 (Ind. Ct. App. 2006) (internal citations omitted). The burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. *Id.*

We review questions of law de novo. *Ind. Dep't of Envtl. Mgmt. v. Lake County Solid Waste Mgmt. Dist., 847 N.E.2d 974, 983 (Ind. Ct. App. 2006)*. In construing any applicable statute, however, we should defer to the interpretation of the agency charged with the statute's interpretation and enforcement. *Ind. Wholesale Wine & Liquor Co., Inc. v. State, 695 N.E.2d 99, 105-06 (Ind. 1998)*. **[**12]** We will consider alternative constructions only if the agency's interpretation is unreasonable. *Id.*

II. Riparian Rights

Lukis argues that the trial court erroneously concluded that the way in which the NRC calculated the parties' respective riparian zones was contrary to law. The appellees disagree, and the parties direct our attention to a number of cases in support of their respective positions. Initially, as a general matter, we observe that a riparian owner acquires his rights to the water from his fee title to the shoreland. *Bath, 459 N.E.2d at 74*. A panel of this court has explained that

> [t]he rights associated with riparian ownership generally include: (1) the right of access to navigable water; (2) the right to build a pier out to the line of **[*331]** navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes such as boating, domestic use, etc.

Parkison v. McCue, 831 N.E.2d 118, 128 (Ind. Ct. App. 2005).

In *Bath,* a panel of this court considered the complaints of neighbors on a lake who disagreed about the proper angle and location of their respective piers. In resolving the dispute, the *Bath* court stated that "[t]here is no set rule **[**13]** in Indiana for establishing the extension of [property] boundaries into a lake between contiguous shoreline properties." *459 N.E.2d at 73*. In *Bath,* the shoreline approximated a straight line and the onshore property boundaries were perpendicular to the shore. Thus, the *Bath* court decided that the appropriate way to determine riparian zones was to extend the onshore boundaries into the lake. *Id.* Additionally, the court emphasized that "the riparian right to build a pier is limited by the rights of the public and of other riparian owners. Therefore, riparian owners may build a pier within the extension of [their] shore boundaries only so far out as not to interfere with the use of the lake by others." *Id. at 76*.

In reaching its conclusion, the *Bath* court relied on an opinion of the Wisconsin Supreme Court--*Nosek v. Stryker, 103 Wis. 2d 633, 309 N.W.2d 868 (Wis. 1981)*. *Nosek* also involved a dispute between contiguous landowners on a lake about the location and size of the landowners' respective piers. In considering how to establish the parties' riparian zones, the *Nosek* court described three possible ways of doing so:

> . . . In the least complicated situation, where the course of the shore approximates **[**14]** a straight line and the onshore property division lines are at right angles with the shore, the boundaries are determined by simply extending the onshore property division lines into the lake. . . .
>
> Often, however, the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles. In such cases, it is inappropriate to apportion the riparian tract by extending the onshore boundaries. Instead, the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries. . . .
>
> A third method is used where the shoreline is irregular. In that case, if it is impossible to draw lines at right angles to the shore to accomplish a just apportionment, then the boundary line should be run in such a way as to divide the total navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore. [FN3]
>
> [FN3.] This same test is stated another way in [*Thomas v. Ashland, Siski-*

> *wit & Iron River Logging Railway, 122 Wis. 519, 524, 100 N.W. 993, 994 (1904)*], as follows: "[T]he whole cove is to be treated as a unit of the shore line by drawing **[**15]** such perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of each so apportioned share of navigable water line to the respective termini of the corresponding shore line pertaining to each owner."

Id. at 870-72 (some internal citations omitted). The court emphasized that the third method "is only to be applied when the irregularities or curvature of the shore are such that lines cannot be equitably drawn at right angles to the shore." *Id. at 872*. In *Nosek,* although the shoreline was a cove, "the shore directly abutting the properties involved [was] a straight line or **[*332]** approximate[d] a straight line." *Id.* Consequently, the *Nosek* court applied the first method--straight extension of the onshore boundaries out onto the lake.

The next case discussed by the parties is *Zapffe v. Srbeny, 587 N.E.2d 177 (Ind. Ct. App. 1992)*, and it also concerns contiguous landowners on a lake whose dispute centered on the location and orientation of a pier and other mooring devices. In considering **[**16]** how to measure the parties' riparian zones, the court turned to *Bath* and explained that "[i]n that case, we recognized that the onshore boundaries of a riparian tract extend into the lake in a line perpendicular to the shore, where the shoreline approximates a straight line." *Id. at 179*. But the *Zapffe* court noted that *Bath* did not answer the following question: "How far into a lake do the boundaries of a riparian tract extend?" *Id.* In answering that question--the resolution of which is not pertinent to the matter at hand--the court stated that "[i]nstead of a rigid application using a measure of depth or length to determine riparian boundaries, the better view would be to apply a 'reasonableness' test to accommodate the diverse characteristics of Indiana's numerous freshwater lakes." *Id. at 181*. The reasonableness determination "should be decided on the basis of the facts and circumstances of each particular case so that a court can treat each affected riparian owner equitably." *Id.*

Having reviewed the above caselaw, it is apparent to us that the standards contained therein are fluid and best applied on a case-by-case basis. Specifically, the *Bath* court concluded that there is no set **[**17]** rule for establishing the extension of boundaries into a lake between contiguous shoreline properties and the *Zappfe* court applied a non- rigid reasonableness test. The *Nosek* apportionment method would be a perfectly appropriate way to solve the parties' dispute, but this method has never been adopted as a fixed rule in Indiana. Indeed, as we have just concluded, there is no fixed rule governing such disputes. The trial court, therefore, erroneously concluded that the NRC's failure to follow the *Nosek* rule was contrary to law.

In fact, the NRC acknowledged the wisdom of the *Nosek* rule, merely concluding that the extension of boundary lines would accomplish an equally fair result. The NRC acknowledged that the shoreline "is generally irregular and the parties' onshore property lines are not perpendicular to the shoreline" and found that a "complete reliance" on the extension of boundary lines lakeward was "misplaced[.]" Appellant's App. p. 24. The NRC then concluded, however, that, "[i]n this particular case, the result of establishing the parties' riparian zones by extending onshore property lines lakeward, *equivocates the apportionment of riparian zones* consistent with the amount of **[**18]** shoreline owned by each respective owner." *Id.* at 24-25 (emphasis added). Having carefully reviewed the facts and circumstances of the case, the NRC concluded that extending the property lines lakeward was equitable and resulted in a fair apportionment. That there may have been other results that would, likewise, have been equitable does not mean that the NRC arrived at a result that was erroneous or contrary to law. Nothing in the NRC's decision warrants second-guessing from the judicial system.

The appellees disagree, describing the "devastating effect" of the NRC's decision. Appellees' Br. p. 15. Specifically, they argue that Ray is at the mercy of his neighbors, who currently permit him to place his lift and boat in a way that slightly encroaches on their riparian zone. They are under no obligation to do so, however, and could refuse to allow him to do so in **[*333]** the future. Ray notes that "for the first time ever, [he] does not have access to navigable water exclusive of any other owner." *Id.* at 16. Thus, the appellees argue that even if equity is the correct standard to apply, the NRC's decision "missed the boat." *Id.* at 19. Initially, we observe

that all riparian owners have the right **[**19]** of access to navigable water. *Parkison, 831 N.E.2d at 128*. To the extent that Ray finds himself with no such access, he is free to institute another action with the NRC to resolve the situation. [2]

> 2 It appears to us from reviewing the record that if Lukis and the Blackburns moved their respective piers westward and pivoted them slightly clockwise, everyone's problems would be solved. We leave that to the NRC's discretion, however, in the event that a future action is initiated.

Furthermore, we note that the appellees purchased their respective lots pursuant to a homeowner association's constitution and bylaws, which provide, among other things, that "[e]ach lakefront lot owner shall have full riparian rights to the lakefront bounded by the respective property lines extended past the shoreline." Appellant's App. p. 198. For an unexplained reason, the NRC found that this issue was not dispositive. We disagree, inasmuch as a party should not be permitted to assert rights that have already been given away. Here, the appellees agreed that a condition of owning their respective lots was that their riparian zones would be determined by extending their property lines into the lake. Having made **[**20]** such an agreement, they should not have been permitted to argue for a contrary method to calculate their riparian zones.

Finally, the appellees direct our attention to the Indiana Administrative Code, which considers piers and boat lifts to be temporary structures and states that temporary structures may not "infringe on the access of an adjacent landowner to the public freshwater lake" or "be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake." *Ind. Admin. Code tit. 312, r. 11-3-1-(b)(2)*, -(b)(4). The appellees contend that Lukis's pier infringed on their access to the lake, causing them to have to "drastically reconfigure and shorten their piers and relocate their boats." Appellees' Br. p. 18. Additionally, they argue that his pier is unusually wide and long--more than twice as long and seven times as wide as the pier of his predecessor. [3]

> 3 The appellees make a final argument that the NRC decision resulted in an inverse condemnation. Initially, we note that there is no condemning authority named as a party; thus, we could provide no relief for any alleged "taking." Furthermore, the appellees have not alleged that a taking has **[**21]** occurred for which they have sought and not received just compensation. *See* Appellees' Br. p. 27 (acknowledging that they "have not filed an inverse condemnation action"). Thus, we will not address this argument.

It is apparent that these arguments amount to requests to reweigh the evidence, which our standard of review does not permit. The NRC concluded that based on the scant evidence available to it regarding the length and width of piers in the relevant vicinity, Lukis's pier was not unusually long or wide and did not infringe on the appellees' access to the lake. We will not second-guess that determination.

The judgment of the trial court is reversed.

RILEY, J., and ROBB, J., concur.

Bowyer v. IND. Dept. of Natural Resources, 882 N.E.2d 754 (Ind.App 2008)

1 of 100 DOCUMENTS

LARRY BOWYER d/b/a LAKES LIMITED LIABILITY CORP., Appellant-Defendant, vs. INDIANA DEPARTMENT OF NATURAL RESOURCES, Appellee-Plaintiff.

No. 09A02-0612-CV-1116

COURT OF APPEALS OF INDIANA

882 N.E.2d 754*; *2008 Ind. App. LEXIS 550

March 20, 2008, Decided
March 20, 2008, Filed

PRIOR HISTORY: [**1]

APPEAL FROM THE CASS CIRCUIT COURT. The Honorable Julian L. Ridlen, Judge. Cause No. 09C01-0001-CP-5.

Bowyer v. Ind. Dep't of Natural Res., 798 N.E.2d 912, 2003 Ind. App. LEXIS 2156 (Ind. Ct. App., 2003)

CASE SUMMARY:

PROCEDURAL POSTURE: In an action by plaintiff Indiana Department of Natural Resources (DNR) against defendants, the seller and the buyer of a campground, the Cass Circuit Court (Indiana) entered judgment finding that the legal lake level was 702.22 feet. The buyer appealed.

OVERVIEW: The court stated that Ind. Code ch. 14-26-4 did not specify the exact procedure for measuring a public lake's average normal water level. *Ind. Code § 14-26-2-4*, however, did define "shoreline or water line." The two chapters were in pari materia because both governed the management of public lakes; thus, the trial court did not err in using the definition in *§ 14-26-2-4* to determine the average normal water level. The court rejected the buyer's argument that *Ind. Code § 14-26-4-3* required the DNR to have 10 years of water level data. The report had to contain the information necessary to compute the 10-year high water level, but the report did not have to compute that figure. The DNR had observed the average water level at nine points along the lake by observing the soil coloration, vegetative types, and level of debris pursuant to *Ind. Code § 14-26-2-4*; thus, the trial court did not err in using water levels taken on a single day to determine the average normal water level. Furthermore, because the DNR followed the procedure established in *§ 14-26-2-4*, it could not be said that the evidence did not support the trial court's finding.

OUTCOME: The court affirmed the judgment.

COUNSEL: FOR APPELLANT: ROBERT LEIRER JUSTICE, Logansport, Indiana.

FOR APPELLEE: STEVE CARTER, Attorney General of Indiana, ANITA WYLIE, Deputy Attorney General, Indianapolis, Indiana.

JUDGES: NAJAM, Judge. KIRSCH, J., and CRONE, J., concur.

OPINION BY: NAJAM

OPINION

[*755] OPINION - FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Larry Bowyer d/b/a Lakes Limited Liability Corp. ("Bowyer") brings this interlocutory appeal from the trial court's order establishing the average normal water level of Lake Cicott. Bowyer asserts three issues for review, which we consolidate and restate as:

> 1. Whether the trial court properly construed and applied *Indiana Code Chapters 14-26-4* and *14-26-2*.
>
> 2. Whether sufficient evidence supports the court's determination of Lake Cicott's average normal water level.

We affirm.

FACTS AND PROCEDURAL HISTORY

The relevant facts are set out, in part, in our prior decision, *Bowyer v. Indiana Department of Natural Resources, 798 N.E.2d 912, 914 (Ind. Ct. App. 2003)* ("*Bowyer I*"); as follows:

> Bowyer is purchasing on contract a campground located on the southern shore of Lake Cicott in Cass County. In January 2000, [the **[**2]** Indiana Department of Natural Resources ("DNR")] filed a complaint against Bowyer and the seller of the campground, Karen Garling, alleging that Lake Cicott was a public lake and that Bowyer was dumping construction debris into the lake and altering its shoreline without a DNR permit as required by law. On December 11, 2000, the trial court entered a partial judgment finding that Lake Cicott was a public lake subject to DNR regulation, instead of a private lake as argued by Garling. We affirmed this judgment on appeal.

(Citing *Garling v. Ind. Dep't of Nat'l Res., 756 N.E.2d 1029 (Ind. Ct. App. 2001), aff'd on reh'g, 766 N.E.2d 409 (Ind. Ct. App. 2002). trans. denied*).

Based on the determination that Lake Cicott is a public lake, the trial court entered an injunction ("TRO") prohibiting Bowyer from "any and all excavation/construction activities, of any nature whatsoever, below the shoreline of Lake Cicott, until this cause is fully determined." *Bowyer I, 798 N.E.2d at 914*. DNR officials then determined, "for the first time," that Lake Cicott's "shoreline" was located at 702.2 feet above sea level. *Id. at 915*. As a result, the DNR filed a motion to hold Bowyer in contempt for violating **[**3]** the TRO, arguing that Bowyer had performed work below the 702.2-foot shoreline level. The trial court entered an order finding Bowyer to be in contempt of the TRO. Bowyer appealed, and this court reversed, holding that the TRO was vague because the meaning of "shoreline" was not apparent on the face of the TRO and that the DNR had not given Bowyer notice of its shoreline level determination. *Id. at 919-20*.

On December 16, 2004, Bowyer and Garling filed Defendants' Joint Motion to Order Formal Determination of Average Water Level of Lake Cicott. On April 25, 2005, over the DNR's objection, the trial court ordered the DNR to file a report pursuant to *Indiana Code Section 14-26-4-3*, which is necessary to make a formal determination of the average normal water level of Lake Cicott. On July 15, 2005, the DNR filed its Petition to Establish the Average Normal Water Level for Lake Cicott, attaching the DNR's report pursuant to the trial court's order.

The trial court held a hearing on the DNR's petition on March 23, 2006. On August 28, after briefing, the trial court entered its Findings of Fact, Conclusions **[*756]** of Law and Judgment ("Judgment"). The Judgment provides, in relevant part:

> FINDINGS **[**4]** OF FACT
>
> 4. [Bowyer and Garling] filed Defendants' Joint Motion to Order Formal Determination of Average Water Level of Lake Cicott on December 16, 2004. On April 25, 2005, over [the DNR's] objection, this Court ordered [the DNR] to prepare and file the report required under *Indiana Code [Section] 14-26-4-3* to begin the formal determination process.
>
> 5. On July 15, 2005, [the DNR] filed a Petition to Establish the Average Normal Water Level for Lake Cicott. The petition seeks to establish the legal lake level at 702.22 feet, National Geodetic Vertical Datum, 1929 ("NGVD'29") [1] for Lake Cicott in Cass County, Indiana. Pursuant to *Indiana Code [Section] 14-26-4-3*, the required report supporting [the DNR's] findings was attached to the petition.
>
> 6. Neither before nor after the December 11, 2000, Order entered herein determining Lake Cicott to be a public freshwater lake has there been a legally established water level.
>
> ***DISCUSSION***
>
> 7. Under *Indiana Code § 14-26-2-5(d)* "the state (1) has full power and control of all the public freshwater lakes in Indiana both meandered and unmeandered; and (2) holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana **[**5]** for recreational purposes[."]
>
> 8. Pursuant to *Indiana Code § 14-26-2-5(e)*, "A person owning land bordering a public fresh water lake does not have

the exclusive right to the use of the waters of the lake or any part of the lake." The law further charges the Indiana Department of Natural Resources with the preservation and stewardship of Indiana's lakes:

> "Burns *Ind. Code Ann. § 14-26-2-6.* **Changing of level of water or shoreline**
>
> A person may not change the level of the water or the shoreline of a public freshwater lake by:
>
> (1) Excavating;
>
> (2) Filling in; or
>
> (3) Otherwise:
>
> (A) Causing a change in the area or depth of; or
>
> (B) Affecting the natural resources, scenic beauty, or contour of;
>
> the lake below the waterline or shoreline without having a written permit issued by the [Indiana Department of Natural Resources]."[]

[(Repealed 2006).] In order to assess the activities undertaken by Defendant Bowyer, [the DNR] relied on *Ind. Code § 14-26-2-4(2)*, which states that "shoreline or water line" means,

> 2) If the water level has not been legally established, the line formed by the water[] surface at the average level as determined by:
>
> (A) Existing water level records; or
>
> (B) If water level records are not **[**6]** available, the action of the water that has marked upon the soil of the bed of the lake a character distinct from that of the bank with respect **[*757]** to vegetation as well as the nature of the soil.

10. Thus, since the water level of Lake Cicott had not been legally established, [the DNR] was charged with determining the "shoreline or water line" either from existing water level records, which in the present case if any [sic], or by *Ind. Code § 14-26-2-4(2)(B)*. The testimony revealed that there are no sufficient water level records to use to establish the legal level; therefore, [the DNR] had to refer to "the action of the water that has marked upon the soil[]of the bed of the lake a character distinct from that of the bank with respect to vegetation as well as the nature of the soil[,"] which is also referred to as the line of demarcation. Using the line of demarcation, [the DNR-]trained personnel picked nine (9) points around Lake Cicott, which were indicative of points where the action of the water has marked upon the soil of the bed of the lake a character distinct from that of the bank with respect to vegetation as well as the nature of the soil. The average elevation of those nine (9) **[**7]** points showed that the average normal water level is 702.22 NGVD'29. It was the 702.22 NGVD'29 level that has been used from the onset of this action.

11. Pursuant to *Ind. Code § 14-26-4-3(1)*, [the DNR] prepared the report and attached the data necessary to establish the legal lake level of Lake Cicott. Under the facts and circumstances of the case, and based upon the credible evidence before the Court, the Court finds that [the] procedure followed by [the DNR] in establishing the water level was proper, appropriate, and as the law provides, especially where other data as contemplated by *Ind. Code § 14-25-4-3(2)* is unavailable.

12. There is no credible evidence submitted by the defense that the level should be something other than what the [DNR] has determined. The defense expert witness even agreed with the [DNR] process and levels when reconciling the

1929 and 1988 procedures. Without any reliable evidence that Lake Cicott should be established at a different level, this Court is left with no choice but to establish the level of Lake Cicott at 702.22 NGVD'29.

13. In determining the average normal water level, *Ind. Code § 14-26-4-4* provides a list of sources upon which [the DNR] may **[**8]** draw for helpful information:

> "The average normal water level shall be determined by means such as the following:
>
> (1) Old surveys.
>
> (2) Testimony of old inhabitants.
>
> (3) The extent to which drainage and other artificial causes have increased or decreased the natural ground water of the area and affected the water levels of the lake.
>
> (4) Water level measurements made by the following:
>
> 1. The United States Geological Survey.
>
> 2. The [DNR].
>
> 3. Other agencies.
>
> 4. Individuals.
>
> (5) Any other pertinent surrounding facts or circumstances."

14. The language of *Ind. Code § 14-26-4-4* and the panoply of sources suggests that each of such sources, when available, must be weighed as to individual or independent reliability, as well as against other sources used.

15. A significant number of exhibits were presented in the form of old newspaper articles, photos taken by different people over the years, aerial photos of the lake, Department of Transportation **[*758]** highway plans from 1927, and old plats of the lake dated in the 1800's or early to mid 1900's. These exhibits generally presented pictures of the lake, but did not state what the lake level was in the pictures, nor anything more than anecdotal evidence, insufficient **[**9]** for qualitative judgment concerning lake level.

16. No old surveys were presented that were reliable in themselves for the determination of the lake level.

17. James Hebenstreit, Assistant Director of the Division of Water, testified that [the DNR] did communicate with citizens around Lake Cicott when [the DNR was] determining the lake level.

18. As to assessing "[t]he extent to which drainage and other artificial causes have increased or decreased the natural ground water of the area and affected the water levels of the lake," there was evidence that at some point a culvert, a twelve[-]inch corrugated metal pipe, was placed under the north-south road that skirts the east side of the lake. Water rising above 702.23 feet above sea level, NGVD'29, would enter such culvert. . . .

19. It is unknown the degree to which highway right[-]of[-]way improvements from the time when U.S. Highway 24 was constructed, circa 1927, to the present may have affected water level.

20. Testimony revealed that water level measurements, to the extent any records were available, were used. [The DNR] used the records it made when establishing the line of demarcation earlier in the course of this case to determine **[**10]** the water level.

21. *There is no credible evidence submitted by the defense that the level should be something other than what the [DNR] has determined.* Again, the defense expert witness even agreed with the [DNR] process and levels when the 1929 and 1988 systems for sea level readings are reconciled. Without any reliable evidence that Lake Cicott should be established at a different level, this Court is left with no choice but to establish the level of Lake Cicott at 702.22 NGVD'29. . . .

Appellant's App. at 12-15 (emphasis added). The trial court entered judgment finding that the "legal lake level for Lake Cicott in Cass County, Indiana, pursuant to Ind. Code [Chapter] 14-26-4 is established at 702.22 feet NGVD'29." *Id.* at 15. Bowyer now appeals.

> 1 "NGVD'29" stands for The Nation Geodetic Vertical Datum of 1929, known after May 10, 1973, as the Sea Level Datum of 1929. *See* U.S Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Geodetic Survey, Frequently Asked Questions, http://geodesy.noaa.gov/faq.shtml#WhatVD29VD88 (last visited February 4, 2008).

DISCUSSION AND DECISION

Issue One: Statutory Construction and Application

Bowyer contends that the trial court incorrectly construed **[**11]** *Indiana Code Sections 14-26-2-4* and *14-26-4-3*. Specifically, Bowyer argues that under *Indiana Code Chapter 14-26-2*, to establish a shoreline or water line, "the clear inference is that . . . a single observation [of the water level] could be adequate, but where [*Indiana Code Chapter 14-26-4*] is the governing statute, at least ten years' observation is required." Appellant's Brief at 10. Thus, Bowyer argues that the trial court used an "incorrect legal standard" when it based its determination of "average normal water level," as defined by *Indiana Code Section 14-26-4-1*, on water level measurements taken in a single day. Appellant's Brief at 11. These issues present a matter of first impression.

Bowyer's argument that the trial court applied an incorrect legal standard is essentially a challenge to the trial court's construction of the statutes at issue. Thus, we review the trial court's decision de novo. *Burns v. Johnson (In re S.J.J.), 877 N.E.2d 826, 828 (Ind. Ct. App. 2007)*. The goal of statutory construction is to **[*759]** determine, give effect to, and implement the intent of the legislature. *Sales v. State, 723 N.E.2d 416, 420 (Ind. 2000)*. The legislature is presumed to have intended the **[**12]** language used in the statute to be applied logically and not to bring about an unjust or absurd result. *Id.*

Courts must consider the goals of the statute and the reasons and policy underlying the statute's enactment. *MDM Invs. v. City of Carmel, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000)*. If the legislative intent is clear from the language of the statute, the language prevails and will be given effect. *Hall Drive Ins., Inc. v. City of Fort Wayne, 773 N.E.2d 255, 257 (Ind. 2002)*. "Where statutes address the same subject, they are *in pari materia,* and we harmonize them if possible." *U.S. Gypsum, Inc. v. Ind. Gas Co., 735 N.E.2d 790, 802 (Ind. 2000)*.

Here, Bowyer first contends that the trial court erred by using the definition from *Section 14-26-4-2* when the DNR's authority to determine Lake Cicott's average normal water level was invoked under *Indiana Code Chapter 14-26-4*. *Indiana Code Chapter 14-26-3* confers upon the DNR the authority to initiate or be party to legal proceedings that affect the preservation or maintenance of public lakes. *Ind. Code § 14-26-3-3*. In that regard, the DNR is authorized to establish and maintain the "average normal water level" of Indiana's public lakes. *Ind. Code § 14-26-4-2*. **[**13]** The "average normal water level" is defined as follows:

> *As used in this chapter,* "average normal water level" of a lake means the level between the high water that occurs as a result of excessive precipitation and low water that occurs during protracted dry periods that will do the following:
>
> (1) Provide the most benefit to the public.
>
> (2) Best protect the public health, welfare, and safety.
>
> (3) Best preserve the natural resources of Indiana.

Ind. Code § 14-26-4-1 (emphasis added).

Further, the average normal water level:

> shall be determined by means such as the following:
>
> (1) Old surveys.
>
> (2) Testimony of old inhabitants.
>
> (3) The extent to which drainage and other artificial causes have increased or decreased the natural ground water of the are and affected the water levels of the lake.
>
> (4) Water level measurements made by the following:
>
> (A) The United States geological Survey.
>
> (B) The department [DNR].

(C) Other agencies.

(D) Individuals.

(5) Any other pertinent surrounding facts or circumstances.

Ind. Code § 14-26-4-4. To establish the average normal water level of a public lake, the DNR must prepare a "concise report containing a description of the lake and location, together with all data necessary **[**14]** to reveal and fix: (1) the average normal water level or area of the lake; and (2) the highest elevation to which the water has risen during the prior ten (10) years." *Ind. Code § 14-26-4-3*. The DNR must file the report with the commission and with the "clerk of the circuit court with jurisdiction in the county in which the greatest area of the lake is situated." *Ind. Code § 14-26-4-5*.

Although *Indiana Code Section 14-26-4-4* lists evidence that may be considered in determining a public lake's average normal water level, no section in Chapter 4 specifies the exact procedure for measuring the **[*760]** average normal water level. Thus, we may look to related code sections to determine how to measure a public lake's water level. *Indiana Code Chapter 14-26-2*, entitled "Lake Preservation," contains a section on defining the water line of a public freshwater lake. The section provides, in relevant part:

> As used in this chapter, "shoreline or water line" means: . . . if the water level has not been legally established, the line formed by the water surface *at the average level* as determined by:
>
> (A) existing water level records; or
>
> (B) if water level records are not available, the action of the water that **[**15]** has marked upon the soil of the bed of the lake a character distinct from that of the bank with respect to vegetation as well as the nature of the soil.

Ind. Code § 14-26-2-4 (emphasis added). [2]

2 Indiana Code Title 14, regarding Natural and Cultural Resources, contains two other statutes that define "water level" in some fashion. *Indiana Code Section 14-8-2-181* defines "normal water level of a lake," for purposes of *Indiana Code 14-26-5*, as having the meaning set forth in *Indiana Code Section 14-26-5-2*. *Indiana Code Chapter 14-26-5* governs the lowering of ten-acre lakes, and that chapter defines "normal water level of a lake" to mean:

> (1) the water level of the lake established by law; or
>
> (2) if the water level has not been established, the level where the presence and action of the water has been so constant as to give to the bed of the lake a character distinct from that of the surrounding land with regard to vegetation and the nature of the soil.

Ind. Code § 14-26-5-2. And *Indiana Code Section 14-26-8-2* defines "shoreline or water line" to "mean[] the line that is formed around the lake by the intersection of the water in the lake with the adjoining land when the surface elevation of **[**16]** the lake is: (1) normal; (2) at the average level; or (3) at the average normal level established by law." These definitions are neither more specific nor distinctly different from the definition of "shoreline or water line" in *Indiana Code Section 14-26-2-4*.

Here, the court's order established the "average normal water level" of Lake Cicott. The purpose of determining the average normal water level, in part, is to "[b]est preserve the natural resources of Indiana." *See Ind. Code § 14-26-4-1*. Because *Indiana Code Chapter 4* does not provide a specific mechanism for measuring the "average normal water level," the trial court turned to the definition of "shoreline or water line" in Chapter 2, governing lake preservation. The two chapters are *in pari materia* because both govern the management of public lakes. Thus, we cannot say that the trial court erred when it relied on a definition outside Chapter 4 in order to determine the average normal water level.

Still, Bowyer contends, for two additional reasons, that the trial court erred by applying the definition of "shoreline or waterline" from *Indiana Code Section 14-26-2-4*. First, he maintains that "where 14-26-4 is the governing statute, **[**17]** at least ten years' observation is required" in order to determine the *average* normal

water level. Appellant's Brief at 10. In support, Bowyer cites to *Indiana Code Section 14-26-4-3*. As noted above, that section requires the DNR's report on the average normal water level to contain, in relevant part, "*all data necessary to reveal and fix* . . . the highest elevation to which the water has risen during the prior ten (10) years." *Ind. Code § 14-26-4-3(2)* (emphasis added).

But Bowyer misconstrues that statute. *Indiana Code Section 14-26-4-3* does not require the DNR to have ten years of water level data in order to determine the average normal water level, nor does it require that the report actually state the highest elevation the water has reached in **[*761]** the last ten years. *See id.* Instead, the plain language of that statute requires the report to contain the "*data necessary to reveal and fix*" the highest elevation the water has risen in the past ten years. In other words, the report must contain the information necessary to compute the ten-year high water level, but the report need not compute that figure. *See id.* Thus, Bowyer's argument that computation of the average normal water level **[**18]** requires ten years of water level data is without merit.

In a similar vein, Bowyer contends that the court "never found an average but instead seized upon a single level as the 'average normal level.'" Appellant's Brief at 11. In support, Bowyer notes that an average is a number between two extremes, but the DNR "never determined the high water mark or the low water mark as contemplated by the statute." *Id.* But, again, *Indiana Code Section 14-26-2-4* sets out the procedure to determine a lake's *average* water level, not just the water level on a particular day. Here, the DNR observed the average water level at nine points along Lake Cicott by observing the soil coloration, vegetative types, and lines of debris along the lake pursuant to *Indiana Code Section 14-26-2-4*. Thus, the trial court did not err when it followed the procedure in that statute and used water levels taken on a single day to determine the average normal water level of Lake Cicott.

Issue Two: Sufficiency of Evidence

Bowyer next contends that the evidence does not support the trial court's determination that Lake Cicott's average normal water level is 702.22 feet NGVD'29. Where, as here, the trial court has entered findings **[**19]** of fact and conclusions thereon pursuant to *Indiana Trial Rule 52*, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. [3] *Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005)*. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id.* We review conclusions of law de novo. *Id.*

> 3 Bowyer argues that there was documentary evidence showing the lake's water level and, therefore, the standard of review is de novo. In support, he cites to *Soc'y for Prevention of Cruelty to Animals v. City of Muncie, 769 N.E.2d 669, 673 (Ind. Ct. App. 2002)*. There, the trial court had entered findings and conclusions in support of the judgment. However, we applied a de novo standard of review because the facts of that case were governed **[**20]** by a stipulation of facts, so the trial court only applied the law. Here, there was no stipulation of facts. Thus, the cited case is inapposite.

The DNR cited, in its report, *Indiana Code Section 14-26-2-4* as the definition used to determine the average normal water level. The report further provides:

> B. While some lake level elevations have been recorded over the years, there are no day-to-day lake level records for any period of time on Lake Cicott.
>
> C. Since water level records do not exist, representatives of [the DNR] visited the lake on September 5, 2001 in order to ascertain the normal water level of the lake described in [*Indiana Code Section 14-26-2-4(2)(B)*]. Using this criterion, representatives of [the DNR] picked nine (9) points along the **[*762]** shoreline of the lake that appeared to be representative of where the normal water level would meet the shoreline when the lake's water surface was at its average normal level. These points were picked based on soil coloration, vegetative types and lines of debris. The elevations of each point where [sic] then determined using standard surveying techniques referenced to a temporary benchmark set by [DNR] personnel. Personnel of the survey **[**21]** section of [the DNR's] Division of Water determined the mean sea level elevation of the temporary benchmark. . . .
>
> D. The results of the Survey of September 4, 2001 are as follows: . . . Average Elevation = 702.22 feet, National Geodetic Vertical Datum, 1929.

Appellant's App. at 32.

The report shows that the DNR determined the average normal water level of Lake Cicott by locating nine points along the lake that appeared to represent the normal water level based on soil coloration, types of vegetation, and lines of debris. The DNR then measured the elevation of each of those points and averaged those elevations. The result is the DNR's determination that the average normal water level of Lake Cicott is 702.22 NGVD'29. The evidence shows that the DNR followed the procedure established in *Indiana Code Section 14-26-2-4*, which we approved above. Thus, we cannot say that the evidence does not support the trial court's finding that Lake Cicott's average normal water level is 702.22 NGVD'29. Bowyer's contentions on that issue must fail.

Still, Bowyer argues that the trial court ignored documentary evidence of Lake Cicott's water level and that there was substantial documentary evidence to show **[**22]** that Lake Cicott's average normal water level is something other than 702.22 NGVD'29. But the trial court found that Bowyer submitted no credible evidence that the water level should be something other than what the DNR determined. Moreover, Bowyer's arguments amount to a request that we reweigh the evidence, which we cannot do. *Staresnick, 830 N.E.2d at 131*. Thus, Bowyer's contentions are without merit.

Affirmed.

KIRSCH, J., and CRONE, J., concur.